



REPUBLIC OF KENYA



**Wanjiru v Prosecution (Criminal Revision 345 of 2020)  
[2025] KEHC 1306 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1306 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION 345 OF 2020  
DO CHEPKWONY, J  
JANUARY 30, 2025**

**BETWEEN**

**SAMUEL KAHUHA WANJIRU ..... APPLICANT**

**AND**

**PROSECUTION ..... REPUBLIC**

**RULING**

1. The Applicant, Samuel Kahuha Wanjiru, jointly with others being John Mucheru Wanjiku (who was acquitted) Samson Kahuha Wanjiru, James Mathenge Nyambura and Stephen Karuiki Waithera were charged with the offence of Office Breaking and Stealing Contrary to Section 306 (a) of the *Penal Code*.

The particulars were that: -

“On the nights of 30<sup>th</sup> April, and 1<sup>st</sup> May, 2016 at Githunguri township in Githunguri District within Kiambu County, the Applicant with others not before court broke and entered office of Pharis Muchai and stole from therein one Laptop make Toshiba, TV make Sony, Meko Gas, Thermos Flask, Epson 720 Printer, four Title deeds, 22 Land Certificates, ECD Diploma, Certificates, Public Address System, Curtains, ID Card and cash 17,000/= all valued at Kshs. 426,200.00/=, the property of Pharis Muchai.”

The 2<sup>nd</sup> and 4<sup>th</sup> accused were also charged with an alternative count of Handling Stolen Goods Contrary to Section 322 (1) and (2) of *Penal Code*.

2. The matter proceeded to full trial whereby the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused persons were found guilty and convicted for the offence of Office Breaking and Stealing while the 1<sup>st</sup> accused was acquitted. Each of them was sentenced to serve five (5) years imprisonment for the same offence.
3. The Applicant and the other above mentioned three accused persons were also charged with the offence of Burglary Contrary to Section 304 (2) and Stealing Contrary to Section 279 (b) of the *Penal Code*



in Githunguri Criminal Case No. 597 of 2016. The case was withdrawn under Section 87(a) of the *Criminal Procedure Code* on 15<sup>th</sup> August, 2017.

4. Vide a Notice of Motion Application dated 10<sup>th</sup> August, 2021, the applicant has sought the court to consider: -
  - a. The legality of the sentence and concurrence of sentences.
  - b. The time spent in remand custody, a period of three (3) years and two (2) months as per Section 333 (2) of the *Criminal Procedure Code*.
5. The application is supported by a Supporting Affidavit sworn by the Applicant, whose case is that he was arrested and charged with the offence of House breaking and Stealing Contrary to Section 304 (1) of the *Penal Code* and sentenced to serve five (5) years and six (6) years consecutively and has urged that the court orders them to run concurrently. According to the Applicant, he spent a period of three (3) years and two (2) months in remand custody, while awaiting the hearing and determination of his trial and this is what he is seeking the court to consider in having his sentence revised.
6. It is the Applicant's contention that during his incarceration, he has made amends and re-started a journey of rehabilitation by undertaking several prison based programs which include Grade three (3) Carpentry and Grade three (3) Polishing.
7. The Applicant has further mitigated that he suffers from acute cervical spine ailment which has caused severe compression of the spinal code and might exiting nerve root that needs regular physiotherapy sessions. He also states that he is married with one child and the sole bread winner of his family which includes his elderly parents. He prays that his sentence do include a non – custodial sentence.
8. On 21<sup>st</sup> November, 2024, the Prosecution Counsel opted to respond to the said application orally and stated that the applicant was charged with the offence of Breaking and Stealing Contrary to Section 306 (a) of the *Penal Code* and was sentenced to serve five (5) years imprisonment on 28<sup>th</sup> August, 2019. She went on to point out that for the offence in question, the law provides for a sentence of seven (7) years imprisonment as the penalty hence the period of five (5) years meted against the applicant was lenient. She also pointed out that the trial Magistrate had taken into consideration the period the Applicant spent in custody in the sentence he imposed against her. She then stated that in her opinion, the sentence was lawful and the application is thus a waste of court's time and should be dismissed.
9. In response, the Applicant maintained that the court should consider his application and the time spent in custody.

### **Analysis and Determination**

10. Having read through the application and the Supporting Affidavit filed by the Applicant and listened to the oral submissions and response by the Respondent, I find the issues for determination being whether:
  - a. The sentence meted against the Applicant was unlawful/illegal.
  - b. The Applicant is serving sentences in two cases to warrant an order for concurrent sentences to be affirmed.
  - c. Whether the period spent in custody by the Applicant was overlooked.



11. The High Court is bestowed with supervisory jurisdiction over subordinate courts or any person, body or authority exercising a judicial or a quasi –judicial function pursuant to the Provisions of Article 165 (3) and (6) of the *Constitution of Kenya*, 2010.

Article 165 (3) provided that:

- (3) Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters;
  - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

Article 165 (6) goes on to state that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

12. For the offence of Breaking into Building and Committing Felony, the law provides for a sentence of seven (7) years imprisonment under Section 306 of the *Penal Code* as follows:-

1. Any person who—
  - a. breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
  - b. breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.

13. Having read through the record in Githunguri Criminal Case No. 607 of 2016, this court finds that the trial court sentenced the Applicant to serve a sentence of five (5) years imprisonment. As for the record in Githunguri Criminal Case No. 597 of 2016, the matter was withdrawn under Section 87 (a) of the *Criminal Procedure Code* and the applicant is not serving a sentence in the said matter. Therefore, the only sentence the Applicant is serving is the five (5) years imprisonment not in Githunguri Criminal Case No. 607 of 2016. This being the case, the issue of concurrent and consecutive sentences of five (5) and six (6) years as claimed by the appellant does not exist.

14. On the issue of whether the trial court considered the period spent in custody during trial, it is trite law that Section 333(2) of the *Criminal Procedure Code* provides as follows: -

“Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under Sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

15. The records shows that in sentencing the Applicant and others, the trial court stated this;

“..... However, I have taken into consideration the time spent in remand.....”.



The court therefore notes that the trial court indicated that it had considered the period which the Applicants were in custody in meting out the sentence. However, from the record, the applicant was arrested on 16<sup>th</sup> June, 2016, and arraigned in court on 20<sup>th</sup> June, 2016. He was sentenced on 28<sup>th</sup> August, 2019, which shows that the period he spent in custody during trial was indeed three (3) years and two (2) months. If this period is added to the five (5) year sentence issued by the trial court, it will come to eight (8) years, which therefore amounts to a period longer than the prescribed sentence of seven (7) years for the offence he was charged with.

16. For this reason, the court proceeds to find that the period spent in custody during trial ought to have been considered within the parameters of seven (7) years prescribed period, which would then have translated to a remainder period of three (3) years, eight (8) months. This would then place the total sentence including the period spent in custody per the law to be within the prescribed sentence. The upshot is that the Notice of Motion application dated 10<sup>th</sup> August, 2017, has merit and is allowed in the following terms:
- a. The prayer for declaring the sentence meted against the accused illegal is dismissed.
  - b. The prayer for ordering the sentences to run concurrently is dismissed.
  - c. The sentence of five (5) years imprisonment meted against the applicant is hereby set aside and the same is hereby substituted with a sentence of three (3) years, eight (8) months imprisonment. The same to be effective from the date of sentence, which is, 28<sup>th</sup> August, 2019.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:-

Martin/Kinyua – Court Assistants

Ms. Ndenda Counsel for the State

Applicant in person – Present

